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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

DENNIS MAKAREWICZ and TRAVIS TUCCILLO,

Petitioners,

vs.

AMERICAN EXPRESS FINANCIAL ADVISORS, INC. (formerly named IDS FINANCIAL SERVICES INC.) and IDS LIFE INSURANCE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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38 pp

QUESTIONS PRESENTED

Question I

May a Court of Appeals circumvent the denial of appellate jurisdiction over orders compelling arbitration contained in 9 U.S.C. § 16(b) by invoking 28 U.S.C. § 1292(a)(1) to review such an order insofar as it relates to equitable claims?

Question II

Assuming that the Court of Appeals had jurisdiction to review the order staying litigation and compelling arbitration of the action, did it have authority to *sua sponte* decide that equitable claims were contractually carved out from the arbitration requirements of the NASD rules--an issue not on appeal and not advanced by either party in the court below?

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QUOTATIONS OF STATUTES & REGULATIONS

9 U.S.C. § 16(b)

(b) Except as otherwise provided in Section 1292(b) of Title 28, an appeal may not be taken from an interlocutory order--

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 26 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

28 U.S.C. § 1292(a)(1)

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

NASD Manual (CCH) Code of Arbitration Procedure Rule 10101(b)

This Code of Arbitration Procedure is prescribed and adopted pursuant to Article VII, Section 1(a)(3)

of the By-Laws of the Association for the arbitration of any dispute, claim or controversy arising out of or in connection with the business of any member of the Association, or arising out of the employment or termination of employment of associated person(s) with any member, with the exception of disputes involving the insurance business of any member which is also an insurance company:

(b) between or among members and associated persons;

NASD Manual (CCH) Code of Arbitration Procedure Rule 10201(a)(2)

(a) Any dispute, claim or controversy eligible for submission under the Rule 10100 Series between or among members and/or associated persons, and/or certain others, arising in connection with the business of such member(s) or in connection with the activities of such associated person(s), or arising out of the employment or termination of employment of such associated person(s) with such member, shall be arbitrated under this Code, at the instance of:

(2) a member against a person associated with a member or a person associated with a member against a member; and

NASD Manual (CCH) Code of Arbitration Procedure IM-10100

* * *

Action by members requiring associated persons to waive the arbitration of disputes contrary to the provisions of the Code of Arbitration Procedure shall constitute conduct that is inconsistent with just and equitable principles of trade and a violation of Rule 2110.

JURISDICTIONAL STATEMENT

The decision which Petitioners ask the Court to review was issued by the Court of Appeals for the Eleventh Circuit on September 9, 1997. A timely Petition for Rehearing was denied on October 22, 1997. This Court has jurisdiction to review the decision via a Writ of Certiorari issued pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioners (Defendants below) are in the business of providing financial planning services to public customers. Respondents (Plaintiffs below, collectively referred to as "Amex") are subsidiaries of American Express which employ financial planners such as Petitioners.

Until September of 1995, Petitioners were associated with Amex. In October of 1995, Amex brought this diversity action asserting claims for damages and permanent injunctive relief to enforce restrictive covenants in employment contracts with Petitioners. Amex also moved for a preliminary injunction pending resolution of those claims. Petitioners opposed the motion for preliminary injunction, and cross-moved to stay and compel arbitration of the action pursuant to the rules of the National Association of Securities Dealers (the "NASD"). In April of 1996, Amex moved for a declaration that its claims were not arbitrable on the ground that Petitioners had ceased to be associated with an NASD member firm.

On June 30, 1996, the District Court issued a decision which resolved the pending motions. The decision denied Amex's motion for a preliminary injunction (the "Preliminary Injunction Order"), and stayed and compelled arbitration of the action (the "Stay/Compel Order"). Amex then appealed those orders. It appealed the Preliminary Injunction Order under 28 U.S.C. § 1292(a)(1), and the Stay/Compel Order under the doctrine of pendent appellate jurisdiction. Petitioners acknowledged appellate jurisdiction over the Preliminary Injunction Order, but challenged jurisdiction over the Stay/Compel Order.

On September 9, 1997, the Court of Appeals issued its decision (the "Decision") partially dismissing Amex's appeal, and partially reversing the District Court orders. The Decision recognizes that 9 U.S.C. § 16(b) prohibits review of the Stay/Compel Order. Nevertheless, the Decision then goes on to dissect that order into two parts -- the stay of damage claims and the stay of claims for permanent injunctive relief -- and to review the stay of the injunction claims under 28 U.S.C. § 1292(a)(1), along with its review of the Preliminary Injunction Order, as if § 16(b) does not apply to orders staying and compelling arbitration of equitable claims. The Decision thus dismissed the appeal of the Stay/Compel Order insofar as it relates to arbitrability of the damage claims, but reviewed the order as it relates to arbitrability of the claims for permanent injunctive relief.[1]

The Decision then goes on to reverse the Stay/Compel Order as it relates to Amex's claims for permanent injunctive relief, as well as the Preliminary Injunction Order. It held that the subject employment contracts carve out claims for injunctive relief from the arbitration requirements of the NASD rules, and directed the District Court to proceed with litigation of those claims. It is this portion of the Decision which Petitioners ask this Court to review.[2] Petitioners contend that by reaching the arbitrability issue, the Decision's jurisdictional analysis violates the prohibition of interlocutory review contained in 9 U.S.C. § 16(b), and that its substantive analysis of that issue creates an improper end-run around the arbitration

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[1] It should be noted that this jurisdictional analysis was never advanced by Amex. Amex sought review of the entire Stay/Compel Order under the doctrine of pendent appellate jurisdiction. The concept of bisecting that order and using 28 U.S.C. § 1292(a)(1) to review the part concerning the injunction claims emerged for the first time in the Decision.

[2] As noted, Amex did not assert that its injunction claims were contractually carved out from arbitration. Amex asserted only that *all* of its claims were non-arbitrable because the Petitioners had ceased to be associated with an NASD member firm, *i.e.*, that there was no longer an arbitration agreement between the parties.

rules of the NASD -- rules to which the parties contractually agreed to be bound and which have been approved by the S.E.C. for the regulation of the national securities industry.

ARGUMENT

The Court Should Grant This Petition Because The Decision Improperly Expands The Jurisdiction Of The Courts Of Appeal In Violation Of 9 U.S.C. § 16(b) And Threatens Serious Harm To Substantive Federal Arbitration Law

The Decision is inimical to the Federal Arbitration Act and the caselaw interpreting it, as well as to related appellate procedure. Moreover, not only does the Decision violate federal law, but it does so in a way that will infringe upon the rights of many thousands of people, and which will adversely affect scores of cases each year.

There are more than 5,000 securities firms which are members of the NASD. More than 500,000 financial advisors are associated with these firms. Every day, many of these people change employment from one firm to another. Each year there are scores of suits such as the present in which firms seek to prevent their former employees from continuing to work with their clients at their new firms. The firm typically asserts claims for damages and permanent injunctive relief, and moves for a preliminary injunction. The advisor ordinarily cross-moves to stay the action and compel NASD arbitration of the dispute. The preliminary injunction is resolved -- either by agreement of the parties or by the court -- and the merits of the dispute are usually compelled to NASD arbitration. Pursuant to 9 U.S.C. § 16(b), the arbitration is then supposed to proceed unimpeded by any interlocutory appeal of the order staying litigation and compelling arbitration. The Decision threatens to alter this eminently sensible, and congressionally mandated state of affairs.

According to the Decision, a firm like Amex can immediately appeal the Stay/Compel Order insofar as it relates to its claims for permanent injunctive relief. As is explained in

Point I, below, this analysis misuses 28 U.S.C. § 1292(a)(1), and, equally important, it defeats the mission of 9 U.S.C. § 16(b) -- which, among other things, prohibits the use of 28 U.S.C. § 1292(a)(1) as a means of reviewing a pro-arbitration order. Consequently, the Decision's jurisdictional error contravenes the federal policy favoring arbitration, as well as the statutory scheme that strictly limits interlocutory review of pro-arbitration orders.

Any interlocutory appeal concerning *preliminary* relief does not normally implicate 9 U.S.C. § 16(b) because it does not bring up the issue of arbitrability. This follows from the settled law in every Circuit that courts may grant *preliminary* relief even where the ultimate merits of a dispute are to be resolved in arbitration. A grant of preliminary relief by a court which merely preserves the *status quo* pending resolution of the merits by the arbitrators, who may or may not grant permanent relief, does not violate the Federal Arbitration Act. Consequently, review of the grant or denial of *preliminary* relief need not involve review of the ruling on arbitrability of the claims for permanent relief. The Decision expands jurisdiction to review preliminary injunction orders without regard to the limitation contained in 9 U.S.C. § 16(b).

In addition to the jurisdictional question presented by this Petition, there is also the question concerning the Decision's substantive ruling on arbitrability. The Decision holds that the subject employment contracts carve out claims for injunctive relief from the arbitration requirements of the NASD rules. As is explained in Point II, below, however, the Decision's analysis (which was not advanced by the parties in their briefs or arguments below), threatens serious harm to substantive federal arbitration law in general, and, more specifically, to the arbitration rights of the more than 9,000 financial advisors who are under identical contracts with Amex.

I.

The Decision's Jurisdictional Error

The Decision recognizes that 9 U.S.C. § 16(b) limits the jurisdiction of the Courts of Appeal by expressly prohibiting review of orders staying litigation and compelling arbitration pursuant to 9 U.S.C. §§ 3 & 4. Nevertheless, the Decision then goes on to treat the Stay/Compel Order as if it were two separate orders -- one addressing the arbitrability of Amex's legal claims and the other addressing the arbitrability of its equitable claims -- and to review the latter under 28 U.S.C. § 1292(a)(1) as if § 16(b) does not apply to such orders. There is no basis, however, either in the history or language of the statute, or in the logic of federal arbitration law as pronounced by the decisions of this Court, for creating such an artificial distinction between the appealability of legal versus equitable claims. In so doing, the Decision misuses 28 U.S.C. § 1292(a)(1), and it violates the plain language and intent of 9 U.S.C. § 16(b).

A. The Stay/Compel Order Is Not A Denial Of Equitable Relief Such That It May Be Reviewed Under § 1292(a)(1)

While 28 U.S.C. § 1292(a)(1) does authorize interlocutory review of orders denying injunctions, the Stay/Compel Order is not such an order. The Stay/Compel Order merely stays litigation of Amex's District Court action and compels arbitration. Even if the Stay/Compel Order were to be considered as an effective denial of Amex's injunction claim, it still would not be appealable under 28 U.S.C. § 1292(a)(1). Such a denial can only be appealed under that statute where it threatens "a serious, perhaps irreparable, consequence," and where it "can be effectually challenged only by immediate appeal." *Gulfstream Aerospace v. Mayacamus Corp.*, 485 U.S. 271, 227-28 (1988).

The *Gulfstream* conditions are conspicuously absent here. Amex's ability to press for permanent injunctive relief was in no way diminished by the Stay/Compel Order, only the venue

in which it could do so was changed. Moreover, any interim harm that Amex might suffer during the arbitration was addressed by its preliminary injunction motion which was sought, denied, and appealed. *See J.B. Stringfellow v. Concerned Neighbors In Action*, 480 U.S. 370 (1987); *Carson v. American Brands*, 450 U.S. 79 (1980); *Gardner v. Westinghouse Broadcasting*, 437 U.S. 478 (1978); *Switzerland Cheese Assn. v. Horne's Market*, 385 U.S. 23 (1966).

B. Even If The Stay/Compel Order Is Construed As A Denial Of Equitable Relief, 9 U.S.C. § 16(b) Prohibits Review Of That Order

By its terms, 9 U.S.C. § 16(b) prohibits the use of 28 U.S.C. § 1292(a)(1) as a vehicle for obtaining interlocutory review of the Stay/Compel Order. Section 16(b) was enacted subsequent to § 1292(a), and in it Congress has ordained that an interlocutory order staying and compelling arbitration of an action may be reviewed *only* pursuant to 28 U.S.C. § 1292(*b*):

> Except as otherwise provided in Section *1292(b)* of Title 28, an appeal may not be taken from an interlocutory order
>
> (1) granting a stay of any action under section 3 of this title;
>
> (2) directing arbitration to proceed under section 4 of this title;
>
> * * *

9 U.S.C. § 16(b)(emphasis added).

As one commentator has observed:

> [This] is a pro-arbitration statute designed to prevent the appellate aspect of the litigation process from impeding the expeditious disposition of an arbitration . . . The mission of § 16 is to assure that if the district court does determine that arbitration is called for, the court system's interference with the arbitral process will terminate then and there,

> leaving the arbitration free to go forward. To accomplish this, § 16 provides in general that there may be no appeal from the pro-arbitration determination until after the arbitration has gone forward to a final award . . . .

David D. Siegel, *Practice Commentaries* 9 U.S.C. § 16 (1997). Because there was no certification by the District Court pursuant to 28 U.S.C. § 1292(b), a plain reading of § 16(b) leads to the conclusion the Court of Appeals lacked jurisdiction to review any part of the Stay/Compel Order. This Court has never addressed the scope of 9 U.S.C. §16(b). The analysis in the decision constitutes a novel (even bizarre) result in light of the plain language of the statute and warrants granting of the Petition to ensure that the statute is given effect in accordance with the plain language and intent of Congress.

II.

The Decision's Substantive Error

Another reason why the Court should grant this Petition is to correct the Decision's substantive error. The Decision holds that the subject employment contracts carve out claims for injunctive relief from the arbitration requirements of the NASD rules. This holding is erroneous on three grounds -- (1) NASD rules prohibit enforcement of such a waiver of arbitration rights, (2) the contract does not express such a waiver, and (3) no such waiver was raised in the District Court (or even on appeal).

A. NASD Rules Prohibit Enforcement Of A Contractual Waiver Of Arbitration Rights

NASD rules contain a broad arbitration clause which require that "[a]ny dispute, claim or controversy eligible for submission . . . between or among members and/or associated persons . . . arising in connection with the business of such member(s) or in connection with the activities of such associated person(s), or arising out of the employment or termination of employment of such associated person(s) with such

member, shall be arbitrated under this Code . . ." NASD Manual (CCH) Code of Arbitration Procedure Rule 10201(a)(2).[3]

An Interpretive Memorandum explains that NASD rules do not permit NASD member firms like Amex to enforce waivers of arbitration rights in contracts with their advisors:

> Action by members requiring associated persons to waive the arbitration of disputes contrary to the provisions of the Code of Arbitration Procedure shall constitute conduct that is inconsistent with just and equitable principles of trade and a violation of Rule 2110.

NASD Manual (CCH) Code of Arbitration Procedure IM-10100.

In explaining this prohibition, the NASD stated the following:

> It has come to the NASD's attention that certain broker/dealers have been including in their agreements with registered representatives language that purports to waive the representative's right to obtain arbitration of any disputes arising out of the agreement . . . This conflicts with the NASD's Code of Arbitration Procedure, which requires industry disputes to be arbitrated . . .
>
> * * *
>
> [T]he NASD Board of Governors has determined to interpret actions by members requiring associated persons to waive the arbitration of disputes as

[3] The eligibility provision contained in NASD Manual (CCH) Code of Arbitration Procedure Rule 10101(b) is no less broad and includes "any dispute, claim or controversy arising out of or in connection with the business of any member of the Association, or arising out of the employment or termination of employment of associated person(s) with any member . . ."

> conduct inconsistent with just and equitable principles of trade and thus a violation of Article III, section 1 of the Rules of Fair Practice.

52 Fed. Reg. 9232-01 (1987). *See Thomas James Assocs. v. Jameson*, 102 F.3d 60, 66 (2d Cir. 1996) ("When a self-regulatory association of securities firms, under direct federal supervision, ordains that its members may not require their employees to waive arbitration rights, it would be inappropriate for us to enforce such a waiver."). The Decision's substantive arbitrability analysis obviously conflicts with this NASD resolution, and it does so in a manner that infringes upon the arbitration rights of the more than 50,000 financial advisors who operate under NASD rules.

B. The Subject Contract Does Not Express A Waiver Of Arbitration Rights

Not only does the NASD prohibit contractual waivers of the right to arbitrate disputes, but the subject contract clause does not even contain such a waiver. Indeed, that clause is limited to the issue of *preliminary* injunctive relief:

> If a dispute involving this Agreement is submitted for arbitration . . . you agree that [Amex] is entitled to an injunction from a court of competent jurisdiction to keep you from violating these restrictions while the arbitration is pending.

Amex Planner Agreement Section IV(3)(b) (quoted in the Decision at page 9). Thus, the Decision's reference to a carve-out of *permanent* injunctive relief is simply in error. The contract clearly contemplates that the merits of the dispute will be arbitrated, but that Amex may seek a preliminary injunction pending that arbitration.[4]

---

[4] It should be noted that the contractual language concerning preliminary injunctive relief is of no real consequence because it merely reflects the settled law that parties may seek *status quo* preliminary relief in court even in arbitrable disputes. It does not purport to waive the right to arbitrate the merits of any dispute.

C. The Parties Did Not Assert The Existence Of A Contractual Waiver Of Arbitration Rights In The District Court Or In The Court Of Appeals

The concept of the purported waiver was not advanced by either side, and was therefore not addressed in the briefs or argument. Amex did not assert that its injunction claims were contractually carved out from arbitration. It asserted (incorrectly) that *all* of its claims were non-arbitrable because the Petitioners had ceased to be associated with an NASD member firm. Thus, the concept of a contractual waiver was apparently conceived by the Court of Appeals based on its own reading of the employment contract.

Finally, even if there were any doubt concerning the existence or enforceability of a carve-out of the type imagined by the Decision (which there is not), this Court has mandated that:

> Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.

Moses H. Cone Mem. Hosp. v. Mercury Constr., 460 U.S. 1, 24-25 (1983); and that:

> An order to arbitrate the particular grievance should not be denied unless it can be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

United Steelworkers v. Gulf Navigation, 363 U.S. 574, 582-83 (1960). *See also Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 62 (1995) ("due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of

arbitration" *quoting, Volt Information Sciences* v. *Board of Trustees*, 489 U.S. 468, 476 (1989)).

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court issue a Writ of Certiorari to review the Decision.

Dated: New York, New York
January 20, 1998

Respectfully submitted,

By: _____

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APPENDIX

Appendix

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

AMERICAN EXPRESS FINANCIAL ADVISORS, INC. (formerly named IDS FINANCIAL SERVICES INC.) and IDS LIFE INSURANCE COMPANY,

Plaintiffs,

v. CASE NO. 95-1718-CIV-T-23A

DENNIS MAKAREWICZ and TRAVIS TUCCILLO,

Defendants.

ORDER

Before the court is the defendants' request for emergency hearing on the plaintiffs' emergency motion for temporary restraining order or preliminary injunctive relief (Doc. 5). Upon consideration, the notion is **GRANTED**. The Court will hear this matter on **Monday, October, 30, 1995, at 9:00 a.m., in Courtroom E,** of the United States Courthouse, 611 N. Florida, Avenue, Tampa, Florida 33602.

ORDERED in Tampa, Florida, on October 24th, 1995.

/s/ Steven D. Merryday
Steven D. Merryday
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

AMERICAN EXPRESS FINANCIAL ADVISORS, INC. (formerly named IDS FINANCIAL SERVICES, INC.) and IDS LIFE INSURANCE COMPANY,

Plaintiffs,

v. Case No. 95-1718-CIV-T-23A

DENNIS MARKEWICZ and TRAVIS TUCCILLO,

Defendants.

ORDER

This cause came on for consideration upon Plaintiff's Expedited Motion for Leave to Conduct Accelerated Discovery and Memorandum in Support (doc. 2). The Motion does not comply with Local Rule 3.01(g), which requires moving party's counsel to certify that it has conferred in good faith with opposing counsel in an attempt to resolve the issues raised by the motion, and that counsel have been unable to agree upon the resolution of the motion.

Accordingly, it is hereby

ORDERED that Plaintiff's Expedited Motion for Leave to Conduct Accelerated Discovery and Memorandum in Support (doc. 2) is DENIED, without prejudice.

DONE AND ORDERED in Chambers, at Tampa, Florida, on this 1st day of November, 1995.

/s/ Mark A. Pizzo
Mark A. Pizzo
United States Magistrate Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

AMERICAN EXPRESS FINANCIAL ADVISORS INC. (formerly named IDS FINANCIAL SERVICES, INC.) and IDS LIFE INSURANCE COMPANY,

Plaintiffs,

v. Case No. 95-1718-CIV-T-23A

DENNIS MARKEWICZ and TRAVIS TUCCILLO,

Defendants.

ORDER

This cause came on for consideration upon Plaintiff's Expedited Motion for Leave to Conduct Accelerated Discovery and Memorandum in Support (doc. 2). The Motion does not comply with Local Rule 3.01(g), which requires moving party's counsel to certify that it has conferred in good faith with opposing counsel in an attempt to resolve the issues raised by the motion, and that counsel have been unable to agree upon the resolution of the motion. Accordingly, it is hereby

ORDERED that Plaintiff's Expedited Motion for Leave to Conduct Accelerated Discovery and Memorandum in Support (doc. 2) is DENIED, without prejudice.

DONE AND ORDERED in Chambers, at Tampa, Florida, on this 30th day of October, 1995.

/s/ Mark A. Pizzo
Mark A. Pizzo
United States Magistrate Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

AMERICAN EXPRESS FINANCIAL ADVISORS, INC., and IDS LIFE INSURANCE COMPANY,

Plaintiffs,

-vs- CASE NO. 95-1718-CIV-T-23A

DENNIS MARKEWICZ and TRAVIS TUCCILLO,

Defendants.

ORDER

Upon consideration, the defendants' motion for leave to file a memorandum in excess of twenty pages (Doc. 16) is **GRANTED**. The Clerk is directed to file the defendants' proposed memorandum that was submitted with the subject motion on October 27, 1995.

For the reasons discussed by the defendants (1) in their October 27, 1995, memorandum, (2) at the November 1, 1995, oral argument, (3) in their May 1, 1996, memorandum opposing the plaintiffs' motion for a ruling of non-arbitrability, and (4) in their other filings, the Court concludes that all of the claims raised in this action are encompassed by the standard NASD arbitration agreements executed by the parties. Accordingly, the plaintiffs' motions for temporary and preliminary injunctive relief and for a ruling that this dispute is not subject to arbitration (Docs. 3 and 39) are **DENIED**, and the defendants' motion to compel NASD arbitration and stay this action (Doc. 17) is **GRANTED**. All other pending motions are **DENIED AS MOOT**.

This action is **ADMINISTRATIVELY CLOSED** pending the parties' completion of NASD arbitration. The parties shall file with this Court a joint status report on September 1, 1996, and every sixty days thereafter. Any party may move to

reopen this action within twenty days after final disposition of all claims through arbitration. Failure to move to reopen within the time provided will result in the dismissal of this action without further notice.

ORDERED in Tampa, Florida, on June 30th, 1996.

/s/ Steven D. Merryday

Steven D. Merryday
United States District Judge

AMERICAN EXPRESS FINANCIAL ADVISORS, INC. f.k.a. IDS Financial Services, Inc., and IDS Life Insurance Company, Plaintiffs-Appellants,

v.

Dennis MAKAREWICZ, and Travis Tucillo, Defendants-Appellees.

No. 96-3074.

United States Court of Appeals, Eleventh Circuit.

Sept. 9, 1997.

Financial service sued former employees for breach of contract, misappropriation of trade secrets, breach of fiduciary duty, conversion, and intentional interference with prospective business relationships. The United States District Court for the Middle District of Georgia, No. 95-1718-CIV-T- 23A, Steven D. Merryday, J., granted former employees' motion to compel arbitration as to all claims and denied financial service's motion for injunctive relief. Financial service appealed. The Court of Appeals, Tjoflat, Circuit Judge, held that: (1) stay of suit pending arbitration was not appealable, but (2) whether to grant injunctive relief pending arbitration was for court to decide.

Dismissed in part; reversed in part.

[1] FEDERAL COURTS k573
170Bk573

Order staying, pending arbitration, trial of financial service's suit against former employees was not subject to interlocutory appeal, in absence of district court certification. 9 U.S.C.A. § 16(b); 28 U.S.C.A. § 1292(b).

[2] FEDERAL COURTS k573
170Bk573

Order denying financial service's request for preliminary and permanent injunctions against former employees were appealable despite pendency of arbitration proceedings. 28 U.S.C.A. § 1292.

[3] ARBITRATION k7.5
33k7.5

Plain terms of employment agreements between financial service and former employees left decision whether to grant injunctive relief pending arbitration to courts, rather than arbitrators, where agreements provided that if dispute was submitted to arbitration, financial service was entitled to injunction from court to keep employees from violating certain restriction in agreements. 9 U.S.C.A. § 16.

[4] ARBITRATION k4.1
33k4.1

Under Federal Arbitration Act (FAA), upon motion of party, district courts must compel arbitration of all claims subject to arbitration. 28 U.S.C.A. § 1292.

[5] ARBITRATION k4.1
33k4.1

Federal Arbitration Act (FAA) does not require parties to arbitrate when they have not agreed to do so, nor does it prevent parties who do agree to arbitrate from excluding certain claims from scope of their arbitration agreement. 28 U.S.C.A. § 1292.

[6] ARBITRATION k6.2
33k6.2

Because parties are free under Federal Arbitration Act (FAA) to structure their arbitration agreements as they see fit, they may limit by contract the issues which they will arbitrate. 9 U.S.C.A. § 16.

[7] ARBITRATION k7
33k7

When deciding whether parties agreed to arbitrate certain matter, courts generally should apply ordinary state-law principles that govern formation of contracts. 9 U.S.C.A. § 16.

[8] CONTRACTS k143(l)

95kl43(l)

Under Florida law, terms of contract should control where rights and interests of parties are definitely and clearly stated.

***937** Robert W. Merkle, Ward A. Meythaler, Merkle and Magri, P.A., Tampa, FL, Eric D. Brandfonbrener, Grippo and Elden, Chicago, IL, for Plaintiffs- Appellants.

Pace Klein, Smith, Campbell & Paduano, New York City, Sara Soto, Fowler, White, Burnett, Hurley, Banick & Strickroot, P.A., Miami, FL, for Defendants- Appellees.

Appeal from the United States Court for the Middle District of Georgia.

Before TJOFLAT and BARKETT, Circuit Judges, and HOWARD [FN*], Senior District Judge.

> FN* Honorable Alex T. Howard, Jr., Senior U.S. District Judge for the Southern District of Alabama, sitting by designation.

TJOFLAT, Circuit Judge:

American Express Financial Advisors, Inc. ("American Express"), and IDS Financial Services, Inc. ("IDS") appeal the district court's denial of injunctive relief and its administrative closure of their lawsuit pending industry arbitration. We hold that we lack jurisdiction over the appeal from the district court's decision to compel arbitration as to the damages claims. Regarding the district court's denial of injunctive relief, however, we find that we have jurisdiction, and we reverse.

I.

Appellants American Express and IDS provide financial services and insurance to individual and organizational clients nationwide. Appellees Dennis Makarewicz and ***938** Travis Tuccillo worked as financial advisors for appellants until September 14, 1995, when they ended their relationships with American Express and IDS and started their own financial consulting business. According to the appellants' original complaint, filed October 16, 1995, Makarewicz and Tuccillo took approximately 200 of appellants' clients with them when they left, departures which allegedly resulted in the withdrawal of approximately $20 million in investments managed by the appellants. In luring away these customers, appellees allegedly violated contractual agreements that they had signed as an original condition of employment by appellants. [FN1]

> FN1. Section IV(l) of the agreements signed by Makarewicz and Tuccillo stated, in part, the following:
>
> (a) You must not ...:
>
> (1) Encourage or induce anyone to terminate an agreement with [American Express or IDS] without [American Express'] consent;
>
> (2) Encourage or induce any Client to stop carrying out any action related to a Product or Service it acquired from or through [American Express] ...;
>
> (3) Promote or make unwarranted claims against [American Express or IDS];
>
> (4) Encourage or induce any Client to sell, surrender or redeem any Product or Service distributed or offered by [American Express or IDS] without [American Express'] consent.
>
> (b) All of the above provisions apply while the Agreement is in effect and after it ends.

(c) All Records and Materials are the property of [American Express or IDS]. All rights to Records and Materials that you prepare or create in connection with the performance of this Agreement are hereby assigned to [American Express]. You agree that you will not reproduce or allow the reproduction of the Records and Materials in any manner whatsoever, except pursuant to written policy or consent of [American Express].

(d)... Such Records and Materials are open to inspection by [American Express] at any time during your normal business hours. You must return them and all copies of them to [American Express] at any time on request. When this agreement ends, all of these items remain [American Express] property. You must return all of them, together with any licenses you have or control, without demand or compensation.

(e) While this agreement is in effect and after it ends, you agree that you will not reveal the contents of any [American Express] property or allow them to be revealed, except in connection with carrying out your duties under the Agreement. You will not reveal the names and addresses of [American Express] Clients or any other information about them, including financial information. You also will not reveal any of this information about potential Clients, to whom a presentation has been made by an [American Express] Planner, who might reasonably be expected to do business with [American Express or IDS]. You will not allow any of this information about Clients or potential Clients to be revealed.

(f) You agree that the identity of Clients and potential Clients is confidential information. For one year after this Agreement ends, you agree not to use any such information in connection with any business in competition with [American Express or IDS].

> (g) For one year after this Agreement ends, you agree that you will not ... directly or indirectly offer for sale, sell or seek an application for any Product or Service issued or provided by any company to or from a Client you contacted, dealt with or learned about while you represented [American Express or IDS] or because of that representation.
>
> (emphasis added).

On October 16, 1995, appellants brought this diversity suit against Makarewicz and Tuccillo in the United States District Court for the Middle District of Florida. They sued for breach of contract, misappropriation of trade secrets, breach of fiduciary duty, conversion, and intentional interference with prospective business relationships. Appellants sought both injunctive relief and compensatory and punitive damages. With regard to damages, however, the complaint admitted that "[p]ortions of this dispute may be arbitrable pursuant to the [National Association of Securities Dealers' ("NASD")] Code of Arbitration Procedure." Nevertheless, appellants sought both preliminary injunctive relief to preserve the status quo pending arbitration and permanent injunctive relief for whatever claims were not arbitrable.

On October 17, appellees initiated NASD arbitration. [FN2] On October 18, appellants moved for a temporary restraining order ("TRO") pursuant to Fed.R.Civ.P. 65. On October 19, the appellees moved for a hearing on this motion, and on October 27, they ***939** moved for "an order pursuant to the Federal Arbitration Act staying this action and compelling arbitration." [FN3] The district court granted the appellees' motion for a hearing on the issue of preliminary injunctive relief. At the November 1, 1995 hearing, the district court listened to the arguments of both sides, but it did not rule on either the appellants' motion for a preliminary injunction or the appellees' motion to compel arbitration.

> FN2. Appellees have never answered the appellants' complaint. Instead, they have adopted the position, in response to various motions filed by the

> appellants, that all of the claims the appellants have asserted--both legal and equitable--are subject to mandatory NASD arbitration.
>
> FN3. Appellees were apparently referring to the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (1994) ("FAA"). Both parties apparently accept that this act applies to the present case, and we find no reason to disagree. See generally Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 476, 109 S.Ct. 1248, 1254, 103 L.Ed.2d 488 (1989) ("It is undisputed that this contract falls within the coverage of the FAA, since it involves interstate commerce ...")

Months passed. On April 8, 1996, appellants moved for a declaration that no elements of the dispute were subject to NASD arbitration; they argued that the appellees had misrepresented their standing to initiate NASD arbitration. The district court did not respond. On June 30, 1996, the district court finally issued a terse order in which it concluded that "all of the claims raised in this action are encompassed by the standard NASD arbitration agreements executed by the parties." The court reached this conclusion "[f]or the reasons discussed by the defendants (1) in their October 27, 1995, memorandum, (2) at the November 1, 1995, oral argument, (3) in their May 1, 1996, memorandum opposing the plaintiffs' motion for a ruling of nonarbitrability, and (4) in their other filings." The district court therefore granted appellees' motion to compel arbitration as to all claims and denied appellants' motion for injunctive relief. The court administratively closed the case and removed it from its docket. American Express and IDS took this appeal.

II.

[1] As an initial matter, we must address our jurisdiction over the present appeal. The FAA currently governs the appealability of orders disposing of requests to compel arbitration. See 9 U.S.C. § 16 (1994). Section 16(b) of the act provides as follows: "Except as otherwise provided in section 1292(b) of

title 28, an appeal may not be taken from an interlocutory order ... granting a stay of any action under section 3 of this title.... 9 U.S.C. § 16(b) (1994). The district court in this case granted a stay under section 3 of the FAA. [FN4] The district court did not certify this decision for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Therefore, we have no jurisdiction over the district court's decision to stay the present action pending arbitration. [FN5] We cannot, at present, resolve the merits of the defendants' claims for relief.

FN4. Section 3 states the following:

> If any suit or proceeding be brought in any of the courts of the Unites States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement.... 9 U.S.C. § 3 (1994). Although the district court did not cite any authority for its order to stay the present action, section 3 clearly provides such authority.

FN5. Section 16(a)(3) provides the courts of appeals with jurisdiction over "a final decision with respect to an arbitration that is subject to this title." § 9 U.S.C. § 16(a)(3) (1994). Appellants might argue that the district court's decision to submit appellants' claims to arbitration was a final decision. We have held, however, that "orders granting or denying requests to compel arbitration are not final decisions if entered in the course of ongoing actions for legal or equitable relief on the underlying claims." Thomson McKinnon Sec., Inc. v. Salter, 873 F.2d 1397, 1399 (11th Cir.1989) (per curiam). Hence, we have no jurisdiction over this order.

[2] We do have jurisdiction, however, to review the district court's denial of appellants' request for preliminary and permanent injunctions. The district court explicitly denied appellants' motions for injunctive relief. As stated in 28 U.S.C. § 1292(a)(1) (1994), the courts of appeals have jurisdiction over "[i]nterlocutory orders of the district courts... refusing or dissolving injunctions." Therefore, we may review this aspect of the district court's order.

*940 III.

[3] The district court apparently denied appellants' motion for preliminary and permanent injunctions on the ground that the NASD arbitrator should decide this issue. [FN6] When the district court submitted appellants' equitable claims to the arbitrator, the court in effect held that the parties had agreed to arbitrate the question of injunctive relief. We reverse, however, because the plain terms of the contracts in this case contradict the district court's conclusion.

> FN6. Because of its brevity, the district court's order is unclear on this point. One of the arguments made by appellees, however, was that appellants should seek injunctive relief from the NASD arbitrator rather than the district court. The court's order incorporated this argument by reference. We find that the district court denied appellants' request for injunctive relief because the court decided that this claim should be arbitrated.

[4][5][6][7] Under the FAA, upon motion of a party, district courts must compel arbitration of all claims subject to arbitration. See Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218-19, 105 S.Ct. 1238, 1241-42, 84 L.Ed.2d 158 (1985). On the other hand, "the FAA does not require parties to arbitrate when they have not agreed to do so, ... nor does it prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement." Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 478, 109 S.Ct. 1248, 1255, 103 L.Ed.2d 488 (1989) (citations omitted). Because parties are

free to structure their arbitration agreements as they see fit, "they may limit by contract the issues which they will arbitrate." Id. at 479, 109 S.Ct. at 1256. "When deciding whether the parties agreed to arbitrate a certain matter ... , courts generally ... should apply ordinary state-law principles that govern the formation of contracts." First Options of Chicago, Inc., v. Kaplan, 514 U.S. 938, 944, 115 S.Ct. 1920, 1924, 131 L.Ed.2d 985 (1995).

[8] Under Florida law, the terms of the contract should control where the rights and interests of the parties are definitely and clearly stated. Atlanta & St. A.B. Ry. Co. v. Thomas, 60 Fla. 412, 421, 53 So. 510, 513 (1910). Section IV(3)(b) of the agreements signed by Makarewicz and Tuccillo, provided as follows:

> If a dispute involving this Agreement is submitted for arbitration under the Code of Arbitration Procedure of the National Association of Securities Dealers or otherwise, you agree that [American Express] is entitled to an injunction from a court of competent jurisdiction to keep you from violating these restrictions while the arbitration is pending.

This provision leaves no room for ambiguity: the parties intended to allow "a court of competent jurisdiction"--the United States District Court for the Middle District of Florida--to provide injunctive relief. Therefore, we hold that the district court erred in denying injunctive relief on the ground that the parties intended the arbitrator to decide whether to grant such relief. [FN7]

> FN7. Appellees might argue that the district court merely submitted to the NASD arbitrator the issue of who should decide whether appellants were entitled to an injunction. Given that their agreement indicates that they intended to arbitrate certain issues, appellees might argue that the issue of who should grant injunctive relief should be committed to the arbitrator in the absence of clear evidence that such issues should be decided by the district court. The

> Supreme Court, however, has held otherwise: "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clear and unmistakabl[e]' evidence that they did so." First Options of Chicago, 514 U.S. at 944, 115 S.Ct. at 1924 (quoting AT & T Techs., Inc. v. Communications Workers, 475 U.S. 643, 649, 106 S.Ct. 1415, 1418-19, 89 L.Ed.2d 648 (1986)). We find, to the contrary, that the parties in this case deliberately assigned to the district court the question whether appellants would be entitled to injunctive relief.

IV.

On remand, the district court should determine as soon as possible [FN8] whether to grant ***941** appellants' request for preliminary and permanent injunctions. In conclusion, the appeal from the district court's order staying appellants' damages claims is DISMISSED, but the district court's order denying appellants' requests for temporary and permanent injunctive relief is REVERSED.

> FN8. Appellants' claims for temporary and permanent injunctive relief remained pending for 8 1/2 months. The two provisions that barred appellees from competing with appellants, sections IV(1)(f) and IV(1)(g), by their terms lasted for only one year after the date of appellees' separation. By the time appellants reached oral argument before this court, therefore, the two provisions central to their claim for injunctive relief had been mooted--principally because of the district court's delay in ruling on their motions. Luckily for appellants, the one-year time bar did not apply to all of the provisions of their agreements with appellees. It is these remaining provisions that the district court must consider on remand.

END OF DOCUMENT

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-3074

District Court No. 95-1718-CIV

AMERICAN EXPRESS FINANCIAL ADVISORS, INC., f.k.a. IDS FINANCIAL SERVICES, INC., and IDS LIFE INSURANCE COMPANY,

Plaintiffs-Appellants,

versus

DENNIS MAKAREWICZ, and TRAVIS TUCILLO,

Defendants-Appellees.

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

SEP 9 1997

MIGUEL J. CORTEZ
CLERK

Appeal from the United States District Court
for the Middle District of Florida

Before TJOFLAT and BARKETT, Circuit Judges, and HOWARD*, Senior District Judge.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby DISMISSED in part and REVERSED in part in accordance with the opinion of this court;

It is further ordered that each party bear their own costs on appeal.

*Honorable Alex T. Howard, Jr., Senior U.S. District Judge for the Southern District of Alabama, sitting by designation.

Entered: September 9, 1997
For the Court Thomas K. Kahn, Clerk

By: /s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: 10/30/97

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-3074

AMERICAN EXPRESS FINANCIAL ADVISORS, INC., f.k.a. IDS FINANCIAL SERVICES, INC., and IDS LIFE INSURANCE COMPANY,

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FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

OCT 22 1997

MIGUEL J. CORTEZ
CLERK

On Appeal from the United States District Court for the Middle District of Florida

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BEFORE: TJOFLAT and BARKETT, Circuit Judges, and HOWARD*, Senior District Judge.

PER CURIAM:

The petition(s) for rehearing filed by appellees

is Denied

ENTERED FOR THE COURT:

/s/ Illegible

UNITED STATES CIRCUIT JUDGE

ORD-41

*Honorable Alex T. Howard, Jr., Senior U.S. District Judge for the Southern District of Alabama, sitting by designation.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

AMERICAN EXPRESS FINANCIAL ADVISORS INC., et al.,

Plaintiffs,

-vs-

DENNIS MAKAREWICZ, et al.,

Defendants.

FILED

/s/ Illegible

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CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT
OF FLORIDA
TAMPA, FLORIDA

Case No. 95-1718-CIV-T-23A

ORDER

Before the Court is the plaintiffs' motion for leave to conduct injunction-related discovery (Doc. 69). Upon consideration, the motion is **GRANTED.** The parties shall have leave through and including January 31, 1998, to conduct discovery regarding issues on remand. On or before February 7, 1998, the plaintiffs shall advise the Court whether they will pursue injunctive relief and file the appropriate papers with the Court.

ORDERED in Tampa, Florida, on December 4th ,1997.

/s/ Steven D. Merryday
Steven D. Merryday
UNITED STATES DISTRICT JUDGE

cc: Magistrate Judge

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